

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 40px;">Complainant,</p> <p style="padding-left: 80px;">vs.</p> <p>COMMUNICATIONS NETWORK BILLING, INC.,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>DOCKET NO. C-06-188</p>
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**ORDER GRANTING REQUEST FOR LEAVE TO SUPPLEMENT RECORD,
DENYING REQUEST FOR ORAL ARGUMENT, AND
DENYING REQUEST FOR RECONSIDERATION**

(Issued January 24, 2007)

On December 7, 2006, the Utilities Board (Board) issued an "Order Denying Request for Proceeding to Consider Civil Penalty" in this docket. The Board denied a request filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) for a proceeding to consider a civil penalty for an alleged slamming violation committed by Communications Network Billing, Inc. (CNBI).

On December 27, 2006, Consumer Advocate filed a request for reconsideration, asking the Board to reconsider its decision to deny the request for proceeding to consider civil penalty and requesting oral argument.

1. Informal complaint proceeding

The request for a proceeding to consider a civil penalty arose out of an informal complaint from a consumer, Ms. Jeannie Henry, regarding an allegedly unauthorized change in long distance telephone service provider for her employer, Pannar Genetics of Boone, Iowa. Ms. Henry alleged material misrepresentations on the part of the telemarketer who called her.

In its response to the complaint, CNBI stated its telemarketer contacted Pannar Genetics on August 9, 2006, and Ms. Henry completed a recorded third-party verification (TPV). CNBI attached a copy of the recording, which appears to confirm that Pannar Genetics intended to change its long distance service provider. On September 19, 2006, Board staff forwarded the TPV recording to Ms. Henry, asking her to review it and comment by October 2, 2006. Ms. Henry did not reply.

In a proposed resolution issued on October 9, 2006, Board staff stated that, without Ms. Henry's response, staff was unable to conclude the change in service was unauthorized. Staff noted the disputed charges associated with the change in service had been credited.

2. Order denying proceeding to consider civil penalty

In its December 7, 2006, order, the Board stated that Iowa Code § 476.3 provides, in part, that the Board shall grant a request for a formal complaint proceeding whenever the Board determines there are reasonable grounds for investigating a complaint. In this case, where the complainant did not respond to a facially sufficient TPV, the Board did not find reasonable grounds for further

investigation. The Board noted that the consumer's reply to what the company has submitted in response to the complaint, including a TPV recording, can be important to Board staff's investigation and resolution of slamming or cramming complaints. The Board found no reason to revisit staff's proposed resolution, especially where it was clear the consumer had been credited and service had been restored to the preferred carrier. Finding no reasons to expend further resources on a formal proceeding, the Board denied Consumer Advocate's petition for a proceeding to consider a civil penalty.

3. Request for reconsideration and oral argument

In the December 27, 2006, request for reconsideration, Consumer Advocate states this case relates to the state's ability to enforce the requirements of Iowa Code § 476.103, which prohibits unauthorized changes in service and, as a remedial statute, is broadly construed. Consumer Advocate notes that an individual consumer bringing a complaint pursuant to § 476.103 is interested in securing a credit for disputed charges, while Consumer Advocate's interest, on behalf of the public generally, in requesting an administrative proceeding is to determine whether a violation occurred and, if so, whether a civil monetary penalty should be assessed. Consumer Advocate asserts the Board's reasons for denying the request for proceeding to consider civil penalty are erroneous as a matter of law and unsound as a matter of policy.

Consumer Advocate disputes Board staff's conclusion in the proposed resolution that without Ms. Henry's response to the TPV it was unable to conclude

the disputed change in service was unauthorized. Consumer Advocate notes that the resolution commonly reached in the informal process is a credit, not a civil penalty, because the informal process provides no opportunity for hearing. With or without a response from the consumer that brought the complaint, Consumer Advocate states there was a disputed issue of fact in this case, making a hearing necessary. Consumer Advocate argues the Board's order denying further proceedings compounds the error in the proposed resolution by effectively finding that the change was authorized, discrediting the consumer's allegations of misrepresentation.

Consumer Advocate asserts there can be many reasons why a consumer does not respond to an inquiry from Board staff. Consumer Advocate argues there was no reason for the consumer to respond because she had already said what she had to say by alleging misrepresentations in the telemarketing call and that because CNBI had already issued a credit, there was no further relief for her to seek.

Consumer Advocate argues the Board's order erroneously gives preclusive effect to the informal process, contrary to principles of even-handedness and due process. Consumer Advocate notes that if a company fails to respond to a consumer complaint during the informal process, the company is not precluded from providing a defense on the merits in any subsequent contested case proceedings. Consumer Advocate argues a process in which informal processes are binding on one party but not the other would be unfair.

Consumer Advocate asserts the Board's order denying further proceedings inappropriately precludes action by the state on behalf of the public merely because the individual consumer did not respond to staff's request for additional information. According to Consumer Advocate, the Board's order overlooks the public character of the slamming offense and the public character of the civil penalty and effectively makes the individual consumer responsible for enforcing the public statute and public remedy. Consumer Advocate argues the Legislature expressly authorized Consumer Advocate to present slamming and cramming complaints to the Board and states that if Consumer Advocate is to be precluded from seeking a civil penalty, such preclusion must relate to Consumer Advocate's actions or inactions, not those of an individual consumer.

Further, Consumer Advocate states there are reasonable grounds for further investigation in this case. According to Consumer Advocate, Board staff inferred that the consumer's failure to reply to the request for comment on the TPV meant the consumer agreed with CNBI's response and that her allegations were false. Consumer Advocate contends there are reasonable grounds for investigating what the consumer's reasons for failing to reply actually were and reasonable grounds for investigating what CNBI has to say about its telemarketing.

Moreover, Consumer Advocate states that the absence of reasonable grounds for further investigation is not a proper basis for denying a request for a proceeding to consider a civil penalty, arguing that the Board's authority is not limited by any one section of the Code. According to Consumer Advocate, because Iowa Code

§ 476.103 refers only to "an administrative proceeding under this section," the Board is not required to establish a need for further investigation. Consumer Advocate claims that applying § 476.103's "reasonable ground for further investigation" standard to § 476.103 would impede enforcement of the statute by causing the Board to reject enforcement proceedings in cases where violations clearly appear.

Finally, Consumer Advocate argues that conducting a proceeding to consider a civil penalty in this case would further the goal of the statute and that the Board's reasons for denying further proceedings are inconsistent with past Board practice and decisions, cited in an appendix submitted by Consumer Advocate.

4. Request to supplement the record

On January 9, 2007, Consumer Advocate filed a request for leave to supplement the record in this case with an excerpt from File No. C-06-240, another informal complaint proceeding before the Board. Specifically, Consumer Advocate asks the Board to consider a note prepared by Board staff in File No. C-06-240 as an illustration of the fact that consumers may not respond to staff inquiries because the company named in the complaint has issued a credit. The Board will grant the request to supplement the record.

5. Discussion

The Board has considered Consumer Advocate's arguments in support of the request for reconsideration and the supplemental materials admitted into the record, but finds no reason to reconsider its decision to deny the request for proceeding to

consider civil penalty. The Board will deny Consumer Advocate's request for reconsideration.

The Board does not agree with Consumer Advocate's characterization of either the proposed resolution or the Board's order denying further proceedings. The Board does not agree with Consumer Advocate that the proposed resolution amounts to a finding that the consumer agreed with the company's response to the complaint or that by failing to respond the consumer conceded her allegations of misrepresentation were false. Staff simply stated in the proposed resolution that, without the consumer's response, it could not conclude the charge was unauthorized. This is not a finding, proposed or otherwise, that the change was authorized. It is a simple statement of fact.

The Board agrees with Consumer Advocate that there are any number of reasons why a consumer might not respond to an inquiry from Board staff asking the consumer to review and reply to a company's answer to a complaint. The Board recognizes that one of those reasons may be that the consumer is satisfied with a credit for the disputed charge. However, the consumer's reason for not responding may not always be relevant to the Board or its staff. In this case, Board staff specifically asked the consumer to respond to the TPV submitted by the company. In this case, where the consumer failed to reply, staff determined it could not conclude the change in service was unauthorized. Subsequently, the Board determined a formal proceeding to consider a civil penalty was not warranted because there had been no showing of reasonable grounds for further investigation in this case. The

Board did not rule that a consumer's failure to respond will result in the denial of a request for proceeding to consider civil penalty in every case. Rather, the Board determined that, in this case, in which the consumer had not responded, the consumer had been credited, and no other grounds for investigation had been shown, formal proceedings were not necessary.

The Board does not agree with Consumer Advocate's assertion that the Board misapplied the "reasonable ground for further investigation" standard from Iowa Code § 476.3 to determine whether to grant the petition for proceeding to consider civil penalty in this case. Iowa Code § 476.103(3) requires the Board to adopt rules to implement the statute and the Board's rules at 199 IAC 22.23 incorporate the Board's procedural rules at 199 IAC 6 for handling customer complaints. The rules at 199 IAC 6 were adopted to implement Iowa Code § 476.3. Therefore, it is reasonable and appropriate for the Board to apply the standard from Iowa Code § 476.3 to determine whether to grant a request for proceeding to consider civil penalty pursuant to Iowa Code § 476.103. This standard provides that the Board will grant a petition for formal proceedings if the Board "determines there is any reasonable ground for investigating the complaint." It appears Consumer Advocate argues in favor of no standard at all, which would effectively require the Board to grant every request for formal proceeding pursuant to Iowa Code § 476.103, even where there is no reasonable ground for doing so. The Board does not agree with this reading of the statute or Iowa Code chapter 476 generally; it would be a waste of resources to grant formal proceedings when there is no reasonable ground for doing so.

It appears Consumer Advocate believes that civil penalties are necessary in every case to enforce the statutory prohibition against unauthorized changes in telecommunications service. The Board disagrees. The Board concludes that, in this case, the outcome of the informal complaint proceeding advanced the goal of Iowa Code § 476.103. Disputed charges associated with a disputed change in service were refunded and the consumer's preferred service was restored, even though the consumer did not dispute the TPV.

IT IS THEREFORE ORDERED:

1. The request for leave to supplement the record filed by the Consumer Advocate Division of the Department of Justice on January 9, 2007, is granted.
2. The request for oral argument filed by the Consumer Advocate Division of the Department of Justice on December 27, 2006, is denied.
3. The motion for reconsideration filed by the Consumer Advocate Division of the Department of Justice on December 27, 2006, is denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 24th day of January, 2007.